No. 15,478

IN THE

United States Court of Appeals

For the Ninth Circuit

FRANK EGAN,
Appellant,

vs.

HARLEY O. TEETS, Warden State Prison at San Quentin,
Appellee.

APPELLEE'S BRIEF.

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STATEMENT OF THE CASE.

On the 7th day of November, 1956, appellant's petition for a writ of habeas corpus was denied by the District Court. On November 23, 1956, the District Court denied Egan's petition for rehearing and, on December 5, 1956, denied Egan's application for certificate of probable cause. Petitioner thereafter was granted a certificate of probable cause on December 28, 1956.

STATEMENT OF THE FACTS.

Egan was convicted in the Superior Court of the City and County of San Francisco in 1932 for the

crime of murder. The jury found petitioner Egan guilty of first degree murder and recommended leniency and a life sentence was imposed. Thereafter the District Court of Appeal of the State of California, for the First District dismissed Egan's appeal on the ground that a written notice of appeal had not been filed in compliance with the rules on appeal and that no steps had been taken to obtain said record on appeal. See *People v. Egan,* 135 Cal. App. 479. In that proceeding petitioner was represented by counsel.

Petitioner filed a petition for writ of habeas corpus in the United States District Court containing several allegations. Among them was the allegation that petitioner had been denied his right of appeal. The United States District judge denied the petition on the ground that the allegations supported by sufficient facts had been previously presented to the District Court in a prior writ and had been denied by the United States District Court. In dismissing the petition for writ of habeas corpus the District judge stated as follows:

> "Several general grounds for relief are asserted in the present petition, the only grounds which are supported by specific factual allegations have previously been presented to this court in a prior petition for the writ, Case No. 26700-R. After a hearing upon that petition, the Honorable Leonard Yankwich filed comprehensive findings of fact and conclusions of law on April 11, 1947, on which date he dismissed the petition and discharged the order to show cause which had previously been issued."

This court granted a certificate of probable cause solely on the question as to whether or not the District Court properly denied the petition insofar as it alleges the unconstitutional denial of his appeal.

APPELLANT'S CONTENTIONS.

The suppression by the Superior Court judge of a legally sufficient written notice of appeal resulted in the unconstitutional denial of petitioner's right to appeal.

SUMMARY OF APPELLEE'S ARGUMENT.

I.

The District Court properly denied the petition for a writ of habeas corpus on the ground that all allegations supported by specific factual statements had been previously entertained and denied by the District Court, and that the general allegations of the petition, including the allegation that petitioner had been unconstitutionally denied his appeal, were insufficient to state a cause for relief.

II.

The petition for writ of habeas corpus was properly denied as to the allegation of the denial of an appeal since petitioner waived the contention by his failure to raise it in the State Court when the opportunity presented itself; failure to present a contention in the

State Court results in a failure to exhaust state remedies within the meaning of 28 U.S.C. §2254.

APPELLEE'S ARGUMENT.

I.

THE DISTRICT COURT PROPERLY DENIED THE PETITION FOR A WRIT OF HABEAS CORPUS ON THE GROUND THAT ALL ALLEGATIONS SUPPORTED BY SPECIFIC FACTUAL STATEMENTS HAD BEEN PREVIOUSLY ENTERTAINED AND DENIED BY THE DISTRICT COURT, AND THAT THE GENERAL ALLEGATIONS OF THE PETITION, INCLUDING THE ALLEGATION THAT PETITIONER HAD BEEN UNCONSTITUTIONALLY DENIED HIS APPEAL, WERE INSUFFICIENT TO STATE A CAUSE FOR RELIEF.

The District Court properly denied the petition insofar as it alleged an unconstitutional denial of an appeal on the ground that said allegation was too general to state a cause for relief.

The only reference in the petition for the denial of an appeal is as follows: "He was denied of his rights to appeal from his conviction. . . ."

This allegation is one unsupported by any particulars. The petitioner has failed to state any facts to support his general allegation that he was denied the right to an appeal.

A petitioner is required to state the facts upon which he relies as a basis for relief on habeas corpus. He may not rely on a conclusion of law. This universal rule does not require of the petitioner any compliance with legal technicalities. All such rule requires

is an honest and frank statement of the facts upon which he relies. The petition filed in the instant case is typical of the problems created by permitting the pleading of conclusions in habeas corpus petitions. Only the bare conclusion is stated and it is intermixed with much psuedo-legal argument which serves only to confuse and compound the issue. The court should insist that petitioners frankly state the facts upon which they rely as a basis for relief in a habeas corpus petition. The court should state that the legal arguments upon which petitioner rely are secondary to an honest statement of the facts.

The proposition that an allegation of law unsupported by any specific fact is insufficient to state a cause for relief is supported by many cases. See, *Collins v. McDonald,* 258 U.S. 416, 420-421; *Kohl v. Lehlback,* 160 U.S. 293, 299; *Cuddy, petitioner,* 131 U.S. 280, 286. Also see, *Langer v. Ragen,* 237 F. 2d 827, 7th Cir. 1956; and cf. *Price v. Johnson,* 334 U.S. 266, 286-287.

It should be noted that the case of *Price v. Johnson,* supra, although frequently referred to as supporting the proposition that a pleading of a conclusion is sufficient in a habaes corpus case does not so hold. Furthermore, the *Price* case is clearly distinguishable from the present case in that in the case of *Price v. Johnson,* supra, the District Court did not pass upon the sufficiency of the allegation. Whereas, in the present case the District Court expressly determined that the allegations not presented on a prior petition were too general to support a writ of habeas corpus.

In this respect the case of *Price v. Johnson,* supra, stated as follows at 286-287:

> "The government argues before us that the allegation in question, as presented to the District Court, is a mere allegation of law unsupported by reference to any specific facts. As such, the allegation is said to be fatally deficient and to warrant summary denial. . . .
>
> "But this proposition was apparently not presented to or passed upon by the District Court; nor was it determined by the Court of Appeal. The sole complaint made by the government in the lower courts . . . relates to petitioner's alleged abuse of the writ of habeas corpus. . . . We accordingly address ourselves to the alleged abuse of the writ leaving the government free to press its objections to the adequacy of the allegation after the proceedings are renewed before the District Court."

II.

THE PETITION FOR WRIT OF HABEAS CORPUS WAS PROPERLY DENIED AS TO THE ALLEGATION OF THE DENIAL OF AN APPEAL SINCE PETITIONER WAIVED THE CONTENTION BY HIS FAILURE TO RAISE IT IN THE STATE COURT WHEN THE OPPORTUNITY PRESENTED ITSELF; FAILURE TO PRESENT A CONTENTION IN THE STATE COURT RESULTS IN A FAILURE TO EXHAUST STATE REMEDIES WITHIN THE MEANING OF 28 U.S.C. §2254.

Petitioner's contention that he was denied an appeal has been waived by his failure to present the matter to the District Court of Appeal of the State of California on the proceedings to dismiss the appeal. Petitioner has now alleged in the petition for writ of

habeas corpus that he was denied his right to appeal from his conviction. This allegation is particularized by statements in his brief on appeal. In the brief on appeal he asserts that he prepared a written notice of appeal, gave it directly to the trial judge in his criminal case and that this document was withheld from the appeal record. His effort to perfect an appeal was thus frustrated. He alleges that this memorandum complied with the rules on appeal in existence at that time.

Petitioner's appeal in the State Court was dismissed in 1933 in a proceeding reported as *People v. Egan,* 135 Cal. App. 479. At that time affidavits were filed by both parties. In none of the affidavits filed did petitioner or his counsel contend that a legally sufficient notice of appeal had been personally given to the trial judge and had been suppressed by him. Furthermore, it should be noted that the proceedings in 1947 instituted in both the State and Federal Courts failed to contain this allegation. Likewise, affidavits in support of a proceeding filed in the District Court of Appeal in 1947 entitled a Motion to Set Aside the Dismissal of Appeal did not contain such an allegation. At that time affidavits were filed by both petitioner and petitioner's trial counsel. Examination of the affidavits fails to reveal any reference to the filing of a written notice of appeal with the trial judge.

It is evident that this matter could have been raised in the State Court by affidavit on the motion to dismiss the appeal. Furthermore, such contentions

should have been raised in the State Court and failure to raise the matter constitutes a waiver. Indeed, as said in the case of *Brown v. Allen,* 344 U.S. 443 at 503, rights under the federal constitution may be waived at the trial and by failure to assert such errors on appeal. The opinion in *Brown v. Allen,* supra, at 503 states the rule as follows:

> "Of course, nothing we have said suggests that the federal habeas corpus jurisdiction can displace a state's procedural rule requiring that certain errors be raised on appeal. Normally, rights under the federal constitution may be waived at the trial (Citation omitted) and may likewise be waived by failure to assert such error on appeal. (Citation omitted) When a state insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on state habeas corpus he may be deemed to have waived his claim and thus has not right to assert on federal habeas corpus. Such considerations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not do service for an appeal."

The rule of California requires that a party raise all objections and present all defenses at the earliest opportunity. To avoid operation of this rule the party attacking a judgment collaterally must indicate that he had no opportunity at an earlier date to present the matters alleged. *In re Razutis,* 35 Cal. 2d 532, 536; *In re Swain,* 34 Cal. 2d 300, 302.

Under any other rule the defendant at the trial could himself suppress the facts, reserving a case for

his later release after opposing witnesses are no longer available. Or indeed he could wait until the agent of the state who is alleged to have committed the unconstitutional act of suppression, such as suppressing of the notice of appeal or knowingly using perjured testimony is no longer available to deny the allegation. The present case is directly in point. The petitioner has waited 25 years before making the allegation that the trial judge was presented with a written notice of appeal which complied with the rules on appeal and that the trial judge suppressed said notice and excluded it from the record of the proceeding. Needless to say that trial judge is no longer available to deny said allegation.

The rule that a defendant must inquire into matters within his knowledge at the earliest opportunity or waive his right to raise them has been recognized by this court. See *Burrall v. Johnson,* 134 F.2d 614, cert. den. 319 U.S. 768 (1942); *Rogalski v. Jackson,* 146 F. 2d 251 2d Cir. 1944; *Sigurdson v. Landon,* 215 F. 2d 791 at 796. See also *Johnson v. Zerbst,* 304 U.S. 458 at 467. Cf. *Sunal v. Large,* 332 U.S. 174 which holds that a writ of habeas corpus may not be used as a substitute for an appeal. The rule here involved might be accurately stated as follows. All questions must be urged at the trial or raised on appeal or be deemed waived. However, the "constitutional" or "jurisdictional" questions may be raised at any time if (a) the matter appears on the face of the record, or (b) if the matter is of such nature that it could not be raised at the trial as where the defendant did not have

knowledge of the facts upon which he relies or where by the very nature of the denial he was precluded from raising the denial at the trial.

Where the face of the record reflects that the court lacked jurisdiction of such matter the judgment may be attacked at any time.

Matters that are not within the knowledge of the defendant at the time of the trial do not come within the rule of, for example, *Mooney v. Holohan,* 294 U.S. 202 (alleged knowing use of perjured testimony by prosecution). This rule is not to be confused with the fact that the defendant may have been unaware of the legal significance of the facts within his knowledge. Ignorance of the legal significance of the facts does not influence the operation of the waiver of rule. See *State ex rel. Du Faull v. Utecht,* 220 Minn. 431, 19 N.W. 2d 706; *Davis v. Johnson,* 144 F. 2d 862 (9th Cir., 1944).

Also where by the nature of the constitutional objection petitioner is precluded from raising at the trial the matter may be raised by a petition for writ of habeas corpus for example *Moore v. Dempsey,* 261 U.S. 86 at 88 (1922). In this case mob domination at the trial precluded counsel from requesting a delay or change of venue. Likewise in this category fall all of the denial of the assistance of counsel cases; by the very nature of the denial petitioner is deprived of his opportunity to raise the objection.

Because the petitioner Egan did not raise these matters on the proceedings to dismiss his appeal he

has failed to invoke the corrective process of the State of California and the judgment of the District Court denying his petitioner should be affirmed. Petitioner has not exhausted his state remedies, 28 *U.S.C.* §2254.

Dated, San Francisco, California,
July 24, 1957.

Respectfully submitted,

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